



LGBTQI+ PERSONS LIVING IN RELATIONS IN THE NATURE OF MARRIAGE: THEIR RIGHTS AND OBLIGATIONS W.R.T. PAYMENT OF ALIMONY OR PALIMONY

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Abstract-- The issue dealt with in the present research paper deals with rights and obligations of Transgender Persons, also known and falling in the category of “LGBTQI+” in contrast with their human rights based on constitutional provisions when they are living in relations in the nature of marriage, though not married in strict legal sense. Even otherwise, this itself is in question as to whether persons involving a transgender can at all be “married” in *stricto sensu*, in the eyes of law! Factum of marriage in strict sense may not be legal established due to various reasons, *viz.*, for the lack of marriageable age, capacity, consanguinity, legality, already having spouse etc. One of such requisite qualifications for being married is that one of the parties to marriage should be a “male” and the other one “female”. This qualification of recognition of marriage between a male and female cannot be satisfied with respect to marriages involving transgender person. Question therefore would arise as to whether in such cases, merely because the marriage between the parties is not established in the eyes of law in strict legal sense, would it be appropriate on the canvas of Indian Constitution to deny right to livelihood, that is maintenance etc., to such person as a human rights issue? The research paper ultimately finds that the issue needs serious analysis and debate. After all, prerequisite qualifications for becoming entitled to avail “human rights” one has to satisfy the only test “to be human” indeed, and nothing more!

Key words: Transgenders, LGBTQI+, Lesbians, Gays, Queer, Bisexuals, intersex, Alimony, Palimony, Live-in relations; extra-marital relations; extra-marital affairs; transgender; surrogacy; maintenance; subsistence allowance; right to life; right to livelihood; human rights.

RESEARCH QUESTION

Whether a transgender person living in relations in the nature of marriage would have legal rights or status, with reference to subsistence, alimony, palimony, right to residence etc. based on such relationship when an aggrieved person seeks redressal of his grievances against such other live-in partner?

1. INTRODUCTION

In this paper, the present researcher will try to throw light on an aspect of the problem which is the plight of the LGBTQI couples who are living or at any point of time lived together in relations similar to marriage where one of the partners assumed the role of a woman by handling domestic chores etc. and the other assumed role of a man/ husband. The question here arises that in the absence of any special laws to deal with such couples what rights and remedies do such aggrieved people have who have been displaced due to disputes in the relations? Though legislature in its bid has engrafted and put on statute



book the Transgender Persons (Protection of Rights) Act, 2019, the same deals with social and economic rights of the such persons, the Act does not speak about the legality of relationship in the nature of marriage involving a transgender person. No situation has been envisaged under the Act whereby such relationship involving a transgender person can be regulated. Thus, statutory law is silent in this regard, except some slight whisper, as we shall be discussing herein under.

Since same sex couples are not qualified to marry under any law in India, albeit they are not explicitly disqualified as well! In this view of the matter therefore we shall have to look and analyse the alternatives they may have in the light of landmark judgements on the topic.

1.1 TRANSGENDERS AND LGBTQI+: MEANING, DEFINITION, STATUS ETC.

“Transgender” is an expression used generally as an umbrella, which may include those people, who may not identify themselves in consonance with their gender, recorded at the time of their birth. They also include persons who fall in the category between two genders namely ‘man’ and ‘woman’ such that when a person is neither a full man or a full woman. Complicacy would further arise when the gender is titled from one point to another on a gender-scale, various other technical issues arise while dealing with such intricate questions. The purpose obviously of identification of such persons falling in such category must only be to give them special protection and immunities. Insofar as the meaning of the expression “LGBTQI+” is concerned, when unfold, it means and includes persons who are lesbians, gays, bisexuals, transgenders, queer, intersex etc.

2.2 HISTORICAL BACKGROUND

Transgender community is recorded way back from Ramayana and Mahabharata. Transgenders includes and known in India by various names such as hijras, eunich, araranis, thirunangi, kothi, jagtas,/ jogappas, shiv shaktis etc.

Even otherwise the problem of transgender being a biological and psychological the issue must be existing since the times human beings are known to exist. No individual is having any control over the gender of a person at birth, even parents have no control. However, in the present-day time when human rights are cherished throughout the world, this exploited and discriminated class cannot be ignored if the society is to really progress in the present day time.

3.3 JUDICIAL RECOGNITION OF ‘LGBTQI’

Though it is too late in the day to have recognised, the gender existence of transgenders,



the same should be welcome, when judiciary in its bid had to ventilate at least some of the grievances of the aggrieved community by at least giving recognition to their existence by means of their gender identity.

In *Naz Foundation v Govt. Of NCT of Delhi*,¹ Division Bench comprising of two judges of Delhi High Court, in 2019 had an occasion to deal with Constitutionality of part of section 377 of IPC² that deals with unnatural consensual sex between two persons, who are otherwise not incapable in eyes of law due to their minority, insanity etc.

The court struck down the above long standing stated part of section 377 of the IPC, being inhuman and unconstitutional on the anvil of Article 14 of the Constitution of India, 1950, in tune with the aspirations of the people of India and in consonance with the international legal developments in this area.

However, the same did not find favour, by the Supreme Court in *Suresh Kaushal v Naz Foundation*, 2013, when it was observed that it was the prerogative of legislature and not judiciary to deal with such contentious issues. Thus, the earlier decision was set aside.

However, in its five judges Constitutional Bench decision in *Navtej Singh Johar v Union of India*, 2018³ the Supreme Court set aside its earlier decisions in *Suresh Kumar Kaushal* case⁴ and upheld the Delhi High Court decision in *Naz foundation* case⁵ and ultimately held that unnatural sex between competent persons cannot be allowed to continue as an offence on the statute book and that part section. 377 of IPC, that comes in between should be struck down as unconstitutional on the touchstone of Article 14 and Article 21 of the Constitution of India as a human rights issue.

Parallely, in yet another judgement namely, *National legal Services Authority v Union of India*⁶2014, the Supreme Court took upon took upon the task which the legislators should have taken long before, and held to recognize, the gender identity of transgenders as their indispensable right under the Constitution. Various observations were made in the said decision and the government was directed to codify law at the earliest.

In conclusion, what the Supreme Court held was only to recognize transgenders as third

¹ *Naz Foundation v Govt. of NCT of Delhi*, 160 Delhi Law Times 277 (Delhi High Court 2009).

² Section 377, The Indian Penal Code, 1860.

³ AIR 2018 SC 4321.

⁴ Civil Appeal No. 10972 of 2013.

⁵ *Supra*.

⁶ WP (Civil) No 400 of 2012.



genders in addition to prevailing genders of 'male' and 'female'. Careful perusal of the said decision would reveal that except their recognition as third gender, nothing more was given to them in the nature of special reservation in matters of education or employment. Not even any direct monetary support was added to the said dictum.

4.4 THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

Though very lately but rightly, the legislature in its bid had to engraft and put on statute book, the said Act on 6.12.2019 (when it received the assent of the President) and when it was put to force on 10.01.2020.

The long title of the Act says that the purpose of the Act is twofold, firstly, to provide protection on one hand and; secondly, their welfare on the other hand. Amongst various other provisions some are as follows:

1. Prohibition against discrimination, stated in Section 3 of the said Act, in the matters of occupation, employment, education, medical services, movement, residence, tenancy, public place etc.
2. Recognition of gender identity which is self-perceived as per Section 4 of the Act.
3. Issuance of gender certificate as per Section 5 and Section 6 of the Act.
4. Issuance of fresh certificate for change of gender as mentioned in Section 7 of the Act.
5. Govt. to form various schemes for welfare to work against stigma, to make people sensitive, to make environment conclusive as per Section 8 of the Act.
6. Establishment of a mechanism for redressal of grievances as per Section 10 and 11 of the Act.
7. Establishment of National Council under Section 16 and 17 of the Act.
8. Right to residence under Section 12 of the Act.
9. Vocational training and self-employment under Section 14 of the Act.
10. Healthcare facilities under Section 15 of the Act.
11. Offences and penalties mentioned under Section 18 of the Act mentioned herein under:
 - a. It will be punishable offence to make them forced or bonded labour.
 - b. Denial of passage in public place will be punishable.
 - c. Forcing to leave the place of residence would also amount to an offence under the Act.
 - d. To otherwise harm or injure or to abuse physically, sexually, verbally, emotionally and above all economically (maintenance)

The punishment would range for above mentioned offences from a minimum of six



months to two years.

1.5 CONSTITUTIONAL PROVISIONS

It would be appropriate to start with the preamble itself of the Constitution of India which *inter alia* explicitly secures justice: social, economic and political; Liberty of thought, expression and belief and Equality of status, opportunity in education and in employment etc.

More appropriate and specific thereafter be relevant to mention Article 14 of the Constitution of India that guarantees as a fundamental right, forerunner of the Constitution and part of the Basic Structure of the Constitution in terms of 13 judges Bench decision of the Supreme Court in *Keshavnanda Bharti* case.⁷

Thereafter, reference to Article 15 and Article 16 of the Constitution would be apt, that makes the matter beyond speculation when it says that ‘no discrimination, publicly or privately to the detriment of any individual, whatsoever be made on the grounds of sex, gender, etc.’

Reference to Article 19 of the Constitution would be apt now proceeding in order, that gives all citizens a freedom to not only speech and expression but also to form associations, organizations and to assemble peacefully, to form unions.

To crown them all, Article 21 of the Constitution needs to be pressed in service that recognizes the inherent right of an individual “to life and personal liberty”, horizons whereof are expanding day by day with pronouncements of various judgments by the Supreme Court. To name a few Art. 21 has been enlarged to include various aspects such as right of convicted children for special treatment,⁸ health issues due to pollution⁹ etc. Lastly, in the series would be the nine judges Bench decision of the Supreme Court with respect to Right to Privacy in the *Puttaswamy* case¹⁰.

Insofar as the Constitutional provisions with respect to adoption foreign and international treaties and conventions are concerned, it would be appropriate to mention Article 51(c) of the Constitution that gives a directive to the State to endeavour to give respect to international law and treaties with other countries. Similarly, Article 253 of the Constitution, at the cost of repetition recognizes right of Parliament to give effect to

⁷ AIR 1973 SC 1461: (1973) 4 SCC 225.

⁸ *Sheela Barse v Union of India*, AIR 1986 SC 1773: 1986 SCR (3) 443.

⁹ *M.C. Mehta v Union of India*, AIR 1987 SC 965: 1987 SCR (1) 819.

¹⁰ Writ Petition (Civil) No. 494 of 2012, (2017) 10 SCC 1.



international agreements.

1.6 INTERNATIONAL CONVENTIONS

Besides various other conventions and model laws, it would be appropriate to refer to UN's Universal Declaration of Human Rights (1948) along with International Covenant of Civil and Political Rights and International Covenant on Socio, Economic and Cultural Rights (1966). When the same are read with the recommendations made in Yogaykarta, Indonesia (2006), it leaves in no manner any doubt that along with various other Human Rights *viz.*, privacy, humanity, medical rights, non-discrimination, equality, Right to sexual Orientation and gender identity has been recognized as an inherent right of any human being, which cannot be given a go bye by any Act or authority, for which reference may be made to larger bench decision of the Supreme Court in *National Legal Service Authority v Union of India 2014 SC*.¹¹

1.7 INTERNATIONAL LAW

Insofar for International judgements are concerned, various countries, more particularly European and American are very much alert to the issues relating to life and liberty of persons in the nature of transgender. Not only judgements are passed, statutes are also engrafted and put on statute book by respective countries giving different models, though they all lead to one and same direction, i.e., protection of rights and dignity of such persons.

As far statues are concerned, reference may made to Australia, which has enacted at least two Acts dealing with gender identity, namely:

1. Sex Discrimination Act, 1984.
2. Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013.

Federal law in the same line, protections of persons in the name transgenders by enactment of The Mathew Shephard and James Byid, Jr. Hate Crime Prevention Act, 2009 that expands US Federal Hate Crime law, 1969. Likewise, South Africa enacted Alteration of Sex Description and Sex Status Act, 2003. UK passed General Recommendation Act, 2003.

Many other countries have also passed their respective statutes in the same line, thereby

¹¹ WP (Civil) No 400 of 2012.



giving special protection, privileges, immunities and recognition like Netherlands, Germany, Canada, Argentina and so on. Now we are also having our Indian statute which we have already dealt with above.

1.8 FOREIGN JUDGEMENTS

Insofar as the foreign judgements are concerned, primarily, there is a difference of opinion with respect to two lines of thought, namely, the one that gives protection to persons changing or varying their sex/ gender by means of medical or surgical intervention and those cases, where no such protection, privileges or immunity is envisaged who artificially make such changes or otherwise that is they basically identify themselves as another gender than what is assigned to them at birth biologically. In *Re. Corbett v Corbett*,¹² a court of England expressed view that operative intervention should be ignored altogether for the purpose, inasmuch as sexual constitution of an individual is fixed at birth.

Applying the same principles in *R v. Tan*,¹³ conviction was upheld despite a male becoming surgically a female, by yet considering such person as male.

However, there is another line of decisions that recognizes and extends benefit to persons changing their gender on the basis of their post-operative identity, for which reference may be made to New Zealand case in *Re Otahuhu Family Court Case*,¹⁴ Australian case in *Re. Kevin*.¹⁵ Reference may further be made to Malaysian case in *J.G. v Pengarah Jabartan case*.¹⁶

1.9 SAME SEX MARRIAGES

In many countries, more particularly Netherlands, a legal system has been envisaged whereby recognising marriage between same-sex since 1 April, 2001.

However, in India, till the Codification of the Transgender Act, there was no possibility of such marriages. With this enactment, the issue is kept open for interpretation by courts when Section 2(c) of the Act, defining the expression “family” is read which means a group of people related by blood or adoption or marriage. Here the use of the word

¹² [1971] P.83.

¹³ [1983] QBD 1053.

¹⁴ FP No. 048/991/90, dated 30-11-1994.

¹⁵ *Op.cit.*

¹⁶ *Op.cit.*



“marriage”, requires judicial interpretation, for recognition of marriage between persons of same sex in India.

As of 2021, same sex marriage is legally performed and recognized in 29 countries (nationwide or in some jurisdictions) with most recent being Costa Rica (2020).

1.10 CRITICAL ANALYSIS AND CONCLUSION

Though it is very late, it is very much in good taste, that sex identity of transgenders has been recognised by judicial courts and later codified by the legislature. Various rights and privileges have been recognized and advocated for under The Transgender Persons (Protection of Rights) Act, 2019. However, deeper probe in the entire statutory scheme would reveal that gender identification has to have twin purpose in its broad circumspection, namely:

1. Firstly to give them special protection against discrimination and cruelty and also to recognise their access to all public places, which in any considered opinion was otherwise also pre-existent.
2. Secondly, the legislature has to give the aggrieved and exploited transgenders some special reservation, privileges, grant (monetary) and immunities which none is found in the entire statutory scheme.

In the background of the afore-mentioned law and precedent it is no more *res integra* and is unequivocally clear that there cannot be a legal marriage between two persons unless one is man and the other is women. Transgenders, as The Transgender Person (Protection of Rights) Act 2019, describes in section 2(k), certainly would neither fall in the definition of man nor in the definition of woman and therefore there is no law at least in India, that recognises the marriage between man or a woman on one hand and a transgender on the other hand or alternatively marriage between two transgender *inter-se*. Thus, if any or both the parties happen to be a transgender, there cannot be a legally valid marriage in India and once the marriage is no marriage in eyes of law then we shall have to look into and explore the possibility for beneficial interpretation of law and precedent with a view to provide remedy to relationships involving transgenders.

The Supreme Court in its bid in *National Legal Service Authority v Union of India*,¹⁷ while recognizing gender identity of transgenders made a strong recommendation to the legislature to formulate, draft and enact law in this regard.

Consequently, The Transgender Person (Protection of Rights) Act, 2019 has been enacted and put on statute book. Though the Act enumerates all possible relief to the favour of

¹⁷ WP (Civil) No 400 of 2012.



transgenders, be it right to residence and maintenance,¹⁸ discrimination,¹⁹ economic violence, domestic violence, abuses, unfair treatment, denial of access to public places etc.,²⁰ marriages between transgenders has not been recognized throughout the recitals of the Act.

At the same time, careful perusal of the enactment also reveals that relationship between two persons involving a transgender has also not been debarred as well and it has nowhere been said in the enactment that relationship between transgenders shall be immoral, illegal or opposed to public policy or would tantamount to moral turpitude.

Deeper probe of the statutory provisions of the enactment, specifically by virtue of section 2(c) of the Act reveals that there is some whisper with respect to protection being given under the Act to the favour of transgenders when the aggrieved transgender is related with the opposite party as a family not only related by blood or adoption but by “marriage” as well. (Emphasis)

The hallmark of The Transgender Persons (Protection of Rights) Act, 2019 lies in Section 18 that makes abuses against transgenders including physical or mental abuses and last but not the least is “economic abuse”. To say the least, the expression “economic abuses”, by any stretch of imagination would include “Right to Maintenance”.

As said earlier, when the opposite party is a family member by virtue by virtue of section 2(c),²¹ relation based on marriage has also been recognised in the view of the matter therefore, it leaves in no manner any doubt that use of the expression “marriage” in sec 2(c)²² would only mean to anticipate grievances of transgenders against the opposite party when the relationship is, if not marriage *stricto-sensu*, relationship in the ‘nature of marriage’.

In other words, the legislature apprehended and conceived a situation that transgenders can be exploited mentally, physically etc. and economically, not only at the hands of public but at the hands of any of the family members as well, such that not only relationship based on *blood* or *adoption* has been included but, relationship based on *marriage* has also been included within its sweep.

To say the least, the legislature though has explicitly mentioned relationship between a

¹⁸ Sec. 12, The Transgender Persons (Protection of Rights) Act, 2019.

¹⁹ Sec. 3, The Transgender Persons (Protection of Rights) Act, 2019.

²⁰ Sec. 18, The Transgender Persons (Protection of Rights) Act, 2019.

²¹ Section 2(c), The Transgender Persons (Protection of Rights) Act, 2019.

²² *Ibid.*



transgender and opposite party based on marriage, but it can safely be said that by means necessary implication that relationship in the nature of marriage has been covered within the scope of enactment.

In this view of the matter when we conceive a situation of a relationship between two transgenders living together in a common household, with shared household effects for considerably long period with an understanding and practice that one of them goes outside for earning or collection of money whereas the other looks after the home affairs, it would raise a serious problem to the aggrieved transgender looking after home affairs when left alone and capability to earn remaining with the other one. To address such difficult situations the legislature ought to have provided a draft agreement between transgenders living together. Going a step further, doctrine of legitimate expectations and law of estoppel having its foundation in Article 14 of the Constitution, based on principle of reasonableness may also be pressed in service. Human rights indeed are indefeasible, and anyone who acclaims himself to be a human being, he cannot be denied a right to be human, which includes rights to subsistence for being a bare human minimal! [Emphasis]